(41)

No. 04-1034

FILED
DEC 2 - 2005
OFFICE OF THE CL
SUPREME COURT,

IN THE

Supreme Court of the United States

JOHN A. RAPANOS, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, LAURENCE A. PETERSON, AND EDMOND C. PACKEE, JR., IN SUPPORT OF PETITIONERS

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December 2, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS ADDRESSED BY *AMICI*

The climactic escape scene in the movie *Finding Nemo* is premised on the notion that "all drains lead to the ocean." The court below adopted this same premise in holding that the Clean Water Act authorizes the federal government to regulate any property, however remote, that shares a "hydrological connection" with an ocean or other navigable waterway. The questions addressed by *amici* are:

I. Whether the court of appeals erred in adopting a construction of the Clean Water Act that gives no meaning whatsoever to the statutory requirement of navigability.

II. Whether, if the regulatory authority conferred by the Clean Water Act is not constrained by the navigability requirement, the Act exceeds Congress's power under the Commerce Clause.

TABLE OF CONTENTS

INTEREST OF AMICI 1

INTRODUCTION 2

STATEMENT 3

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. THE REQUIREMENT THAT REGULATED WATERS BE "NAVIGABLE" CANNOT BE READ OUT OF THE CLEAN WATER ACT 8

A. "Adjacency" Is A Permissible Construction Of "Navigable" 8

B. "Hydrological Connection" Is Not A Permissible Construction Of "Navigable" 10

II. IF THE "NAVIGABILITY" REQUIREMENT IS MEANINGLESS, THEN THE CLEAN WATER ACT IS UNCONSTITUTIONAL 14

A. The Regulated Activity Is Discharging Fill 14

B. The Discharge Sought To Be Regulated Here Does Not Substantially Affect Interstate Commerce 16

C. Congress Has No General Police Power To Regulate All Water 23

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Economy Light & Power Co. v. United States, 256 U.S. 113 (1921) 11

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 13

Ex parte Boyer, 109 U.S. 629 (1884) 17, 24

GDF Realty Invs., Ltd. v. *Norton*, 326 F.3d 622 (5th Cir. 2003) 19

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 11, 17

Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000) 19

Gilbert v. United States, 370 U.S. 650 (1962) 12

Gonzales v. Raich, 125 S. Ct. 2195 (2005) 7, 18, 19

Kaiser Aetna v. *United States*, 444 U.S. 164 (1979) 6, 17

McDermott Int'l, Inc. v. Wilander, 498 U.S. 337 (1991) 11

Morissette v. United States, 342 U.S. 246 (1952) 11

Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) 22

NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 13

Rancho Viejo, LLC v. Norton, 334 F.3d 1158 (D.C. Cir. 2003) 15, 19

Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001) ..... *passim*

South Carolina v. Georgia, 93 U.S. 4 (1876) 17

The Daniel Ball, 77 U.S. (10 Wall.) 557 (1871) 11, 17

The Montello, 87 U.S. (20 Wall.) 430 (1874) 17

United States v. Deaton, No. MJG-95-2140 (D. Md. Jan. 28, 2002), *aff'd*, 332 F.3d 698 (6th Cir. 2003) 23

United States v. Lopez, 514 U.S. 549 (1995) ..... *passim*

United States v. Morrison, 529 U.S. 598 (2000) ..... *passim*

United States v. Rapanos, 190 F. Supp. 2d 1011 (E.D. Mich. 2002) 4

United States v. Rapanos, 339 F.3d 447 (6th Cir. 2003) 15, 16

United States v. Riverside Bayview Homes, 474 U.S. 121 (1985) ..... *passim*

United States v. Rueth Dev. Co., 189 F. Supp. 2d 874 (N.D. Ind. 2001), *vacated in part*, 189 F. Supp. 2d 874 (2002), *aff'd*, 335 F.3d 598 (7th Cir. 2003) 20, 22, 23

United States v. Rybar, 103 F.3d 273 (3d Cir. 1996) 7, 17, 18, 21

Wickard v. Filburn, 317 U.S. 111 (1942) 7, 19

Statutes

33 U.S.C. § 1251 ..... 3, 7, 20

33 U.S.C. § 1251(b) 23

33 U.S.C. § 1311(a) 3

33 U.S.C. § 1344(a) ..... *passim*

33 U.S.C. § 1344(g)(1) 9, 10

33 U.S.C. § 1362(12) 3

33 U.S.C. § 1362(7) 3

Regulations

33 C.F.R. § 328.3(3) 3, 20

33 C.F.R. § 328.3(7) 3

33 C.F.R. § 328.3(c) 3

Constitutional Provisions

U.S. Const., Art. I, § 8 23

Other Authorities

Clean Water Authority Restoration Act of 2005, S. 912, H.R. 1356, 109th Cong. (2005) 12

Edward A. Fitzgerald, *SWANCC: Isolated Waters, Migratory Birds, Statutory and Constitutional Interpretation*, 43 Nat. Resources J. 11 (2003) 12

GAO Report No. 04-297, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices In Determining Jurisdiction* (Feb. 2004) 9, 22

Lawrence R. Liebesman & Stuart Turner, *Summary of Federal Court Decisions Interpreting the Supreme Court's 2001 Decision in SWANCC*, SH088 ALI-ABA (May 2003) 23

Webster's Third New Int'l Dictionary (unabridged ed. 1976) 4, 11

Wetlands Desperado, Editorial, Wall St. J., Aug. 23, 2004 4

BRIEF FOR THE WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, LAURENCE A. PETERSON, AND EDMOND C. PACKEE, JR., AS *AMICI CURIAE* SUPPORTING PETITIONERS

Amici curiae Washington Legal Foundation (WLF), Allied Educational Foundation (AEF), Laurence A. Peterson, and Edmond C. Packee, Jr. respectfully submit that the judgment of the court of appeals should be reversed.[1]

INTEREST OF *AMICI*

WLF is a nonprofit public interest law and policy center based in Washington, D.C., with thousands of supporters nationwide. WLF engages in litigation and the administrative process in a wide variety of areas, including cases involving property rights and the scope of the federal government's Commerce Clause powers. In particular, WLF has participated as *amicus curiae* in several recent cases that raise statutory and constitutional issues similar to those asserted by the parties in this case, including *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*").

AEF is a nonprofit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law

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[1] Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief have been submitted to the Clerk.

and public policy. AEF has appeared as *amicus curiae* in many cases in which WLF has been involved, including *SWANCC*.

Laurence A. Peterson is the Operations Manager for Travis/Peterson Environmental Consulting, Inc. ("TPECI"), an Alaskan wetlands consulting company. He earned a Master of Science degree in Environmental Health Science from the University of Alaska Fairbanks, completed the U.S. Army Corps of Engineers wetland delineation course, and has identified, evaluated, and permitted wetlands in Alaska for twenty years. Edmond C. Packee, Jr., a professionally registered soil scientist and certified professional in erosion and sediment control, and Senior Scientist at TPECI, also earned a Master of Science degree from the University of Alaska Fairbanks in Mine Reclamation Science, and has identified, evaluated, permitted, and reconstructed wetlands in Alaska for thirteen years. Packee and Peterson have a combined thirty-three years of first-hand experience with the Corps' haphazard and contradictory methods of determining wetlands jurisdiction.

INTRODUCTION

At the climax of the animated movie *Finding Nemo*, a small but plucky fish escapes the clutches of an overenthusiastic child by swirling down a dentist's drain. As his cohorts look on with hope, one of the fish asks the ringleader, "Is he gonna be okay, Gill?" Gill, confident that young Nemo is now safe, replies: "Don't worry. All drains lead to the ocean."

While *Finding Nemo* makes for a very good children's movie, it does *not* make good law. Yet the Army Corps of Engineers would have this Court adopt the principle "all drains lead to the ocean" as the method for deciding whether the federal government can regulate local waters and lands. The moniker for this method, where intermittent surface water runoff connects to drains, which connect to creeks, which

connect to streams, which connect to rivers, which, at some point, widen and deepen enough to become navigable, is the so-called "hydrological connection" rule invented by the Sixth Circuit.

Adopting the *Finding Nemo* principle as a rule of construction of the Clean Water Act, as the court below effectively did, cannot be reconciled with either the statute or our Constitution. It would leave the term "navigable waters" in the Act devoid of any meaning and purpose. And if that were a permissible construction of the Act, the statute would exceed Congress's power under the Commerce Clause by granting the Corps jurisdiction over every drop of water in the Nation.

STATEMENT

In 1972, Congress enacted what came to be known as the Clean Water Act, 86 Stat. 884, as amended, 33 U.S.C. § 1251 *et seq.* The Act prohibits the discharge of any "pollutant," including fill materials, into "navigable waters" without a permit from the United States Army Corps of Engineers. 33 U.S.C. §§ 1311(a), 1344(a), 1362(12). The "navigable waters" subject to the Corps' jurisdiction are defined in the Act as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

Notwithstanding the statutory requirement of navigability, the Corps has by regulation attempted to define the "waters of the United States" as, *inter alia*, "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(3). The Corps also included "[w]etlands

adjacent to" any such waters in this definition, thereby claiming jurisdiction over them as well. 33 C.F.R. § 328.3(7).[2]

When Petitioner John Rapanos decided to develop some of his property in the late 1980s, he discovered that the government considered the property to be "wetlands" within the Corps' regulatory authority. This came as a great surprise to Rapanos, because his "wetlands" are actually dry—and replete with corn—thanks to the county drain commission, which had dug drains at the turn of the twentieth century in order to make the land suitable for farming. *See Wetlands Desperado*, Editorial, WALL ST. J., Aug. 23, 2004, at A12. Yet the government now insisted that the very drains that kept petitioners' property dry magically transformed his farmland into protected "wetlands" subject to regulation. Even more fantastically, the government declared that those same man-made drains were "navigable waters" that somehow affected interstate commerce, and therefore subjected petitioners' property to federal jurisdiction.

None of petitioners' property directly abuts navigable water, but the district court still reached the amazing conclusion that the "wetlands . . . are adjacent to waters of the United States" *See* Pet. App. B34. This decision was based on the irrelevant tangent of whether the lands had surface water connections to distant navigable waters. *Ibid.* It apparently did not matter that the closest navigable water is *twenty miles away*. *United States v. Rapanos*, 190 F. Supp. 2d 1011, 1012 (E.D. Mich. 2002).

The court of appeals declared that deciding whether a piece of land actually touches a navigable body of water is

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2 "The term adjacent means bordering, contiguous, or neighboring." 33 C.F.R. § 328.3(c). "[H]aving a common border: abutting, touching." Webster's Third New Int'l Dictionary 26 (unabridged ed. 1976).

just *too complicated* and abandoned the adjacency test altogether. *See* Pet. App. A8 ("Determining which wetlands are considered 'adjacent to' traditional navigable waters or their tributaries has proved to be a complication in defining CWA jurisdiction"). In its place, it invented a new "hydrological connection" test, stating that a "significant nexus between the wetlands and navigable waters . . . can be satisfied by the presence of a hydrological connection." Pet. App. A16 (citation omitted).

SUMMARY OF ARGUMENT

I. The Clean Water Act does not grant the Corps the authority to regulate every drop of water in the Nation. Rather, the statute applies only to discharges into "navigable waters." 33 U.S.C. § 1344(a). While this Court has recognized a narrow exception to the plain definition of "navigable waters"—namely, that wetlands sharing a bank with navigable waters are themselves considered "navigable"—the scope of the Corps' proposed definition—under which wetlands twenty miles away from navigable-in-fact waters could be considered "navigable"—runs contrary to the plain text of the statute and the intent of Congress.

Wetlands directly adjacent to navigable waters commonly drain into those waters—indeed, this Court has held that it is sometimes difficult to tell where "water ends and land begins." *United States v. Riverside Bayview Homes*, 474 U.S. 121, 132 (1985). The need to prevent discharges into navigable waters from adjacent wetlands, combined with evidence of Congress's intent during passage of the Clean Water Act, led to this Court's holding in *Riverside* that it was perfectly reasonable for the Corps to regulate wetlands directly adjacent to navigable waters.

Whereas concluding that wetlands adjacent to navigable waters are "navigable" might be reasonable, there is no basis in law or fact for construing the definition of "navigable" to include wetlands twenty miles distant from navigable waters.

Yet the court of appeals, using one sentence from the legislative history out of context, stretched the term "navigable" to include anything with a "hydrologic connection" to navigable waters—even though that would mean every molecule of water and water vapor in the Nation. This Court should not adopt this preposterous rule, as the repeated use of the term "navigable" throughout the history of this Nation's laws, as well as this Court's recent decision in *SWANCC*, require that "navigable" retain at least some shred of its original meaning. Restoring the plain meaning of "navigable," moreover, would make the task of determining the constitutionality of the Act's application unnecessary.

II. If this Court were to accept the construction of the Act as advanced by the Corps, the statute as so construed would exceed Congress's power under the Commerce Clause.

The Act clearly defines the regulated activity as "the discharge of dredged or fill material into the navigable waters." 33 U.S.C. § 1344(a). The government, however, has presented no evidence that petitioners' actions cause fill material to enter navigable waters, and can only speculate about the remote possibility of such an occurrence. Petitioners' activities simply do not fall within the regulated activity. Even if they did, the "hydrological connection" rule cannot be sustained as a regulation of the channels of interstate commerce. Although certain *navigable* waters might constitute such channels, the remote wetlands on petitioners' property do not constitute navigable waters under even the most lenient of this Court's Commerce Clause precedents. *See, e.g., Kaiser Aetna* v. *United States*, 444 U.S. 164, 171-74 (1979). And the government has made no argument that the Act regulates the instrumentalities of interstate commerce.

The supposed "hydrological connection" does not have a substantial effect on interstate commerce. Whereas the marijuana at issue in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), and the wheat at issue in *Wickard v. Filburn*, 317 U.S. 111

(1942), were (at least arguably) both commodities bought and sold in economic markets, there is no such commodity or market at issue in this case. Similarly, the Act contains no jurisdictional element to ensure that the requisite nexus with interstate commerce is present. It only grants the Corps power over "navigable waters," 33 U.S.C. § 1344(a), and none of the goals of the Act even refer to commerce or economic activities. *See* 33 U.S.C. § 1251. Congress made no legislative findings to the contrary. The connection of petitioners' wetlands to navigable waters twenty miles away, moreover, are so far removed as to be almost nonexistent. While such a dilution may be the basis of homeopathic medicine, it is certainly too much of an attenuation to have a substantial effect on commerce. "[I]f *Lopez* means anything, it is that Congress's power under the Commerce Clause must have some limits." *United States v. Rybar*, 103 F.3d 273, 291 (3d Cir. 1996) (Alito, J., dissenting).

Congress is prohibited from regulating every drop of water in the Nation because such an exercise would be nothing less than a federal police power, which has been expressly forbidden by the Constitution and this Court: the "traditional and primary power over land and water use" resides with the states. *SWANCC*, 531 U.S. at 174. The government would argue that *SWANCC* has not made one dent in Congress's power to regulate waters far removed from navigable waterways—that the Corps can replace the attenuated avian connection struck down in *SWANCC* with an attenuated hydrological connection. This Court should not reward such a transparent attempt to reach the same remote waters by different means.

ARGUMENT

By creating the unfounded and vague "hydrological connection" rule out of whole cloth, the court of appeals not only ignored the intentions of Congress and this Court that wetlands must actually be navigable or adjacent to navigable waters to be subject to the Clean Water Act, but also eliminated

any possible import of the term "navigable" in the statute. By so doing, the court of appeals impermissibly expanded the reach of Congress's Commerce Clause power, conceivably allowing it to envelop any molecule of water that might one day reach a river, which would grant Congress jurisdiction over all water in the United States.

I. THE REQUIREMENT THAT REGULATED WATERS BE "NAVIGABLE" CANNOT BE READ OUT OF THE CLEAN WATER ACT

The Clean Water Act does not apply to every drop of water in the Nation. The section at issue only makes unlawful unauthorized discharges "of dredged or fill material into the *navigable waters*." 33 U.S.C. § 1344(a) (emphasis added). The court of appeals held that a nonnavigable drain that (perhaps) eventually connects to navigable waters twenty miles away is "navigable." The principal question before the Court, then, is whether "navigable" retains any semblance of its ordinary definition.

A. "Adjacency" Is A Permissible Construction Of "Navigable"

Twenty years ago, in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), this Court was asked to decide whether wetlands directly adjacent to navigable waters were within the jurisdiction of the Corps. The Court first made the observation that "[o]n a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters.'" *Id.* at 132. Wetlands could be considered "waters," however, because "the Corps must necessarily choose some point at which water ends and land begins . . . [and] the transition from water to solid ground is not necessarily or even typically an abrupt one." *Ibid.* This reasoning supported the Court's conclusion that the Corps had jurisdiction over "wetlands adjacent to the 'waters of the United States.'" *Id.* at 139.

The *Riverside Bayview* Court explicitly did not address whether the Corps could regulate "wetlands that are *not* adjacent to bodies of open water." 474 U.S. at 131 n.8 (emphasis added). But its examination of congressional intent regarding wetlands jurisdiction is especially enlightening regarding that very question. As this Court noted in *Riverside Bayview*, when the Clean Water Act was revised in 1977 to allow states to create their own Section 404 permit programs, "Congress provided that the States would not be permitted to supersede the Corps' jurisdiction to regulate discharges into actually navigable waters . . . 'including wetlands adjacent thereto.' Here, then, *Congress expressly stated that the term 'waters' included adjacent wetlands.*" *Id.* at 138 (quoting 33 U.S.C. § 1344(g)(1)) (emphasis added). When carving out exceptions for state permit programs, Congress specifically included adjacent wetlands in its description of the Corps' jurisdiction—but did *not* include non-adjacent wetlands, whether or not they were "hydrologically connected."

Because *Riverside Bayview* did not expressly rule on whether the Act applied to non-adjacent wetlands, there was initially some confusion of the matter. This Court resolved that confusion and definitively answered the question in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), stating that "our holding [in *Riverside Bayview*] was based in large measure upon Congress's unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands *adjacent to navigable waters.*" *Id.* at 167 (emphasis added). In other words, Congress acted reasonably when it subjected wetlands adjacent to navigable waters to the Corps' jurisdiction in 33 U.S.C. § 1344(g)(1), and this Court similarly found that the "the Corps . . . acted reasonably in interpreting the Act to require permits for the discharge of fill material into wetlands *adjacent to* the 'waters of the United States.'" 474 U.S. at 139 (emphasis added).

Adjacency to navigable waters is therefore compatible with the definition of "navigable waters." Conversely, lands

not adjacent to navigable waters cannot seriously be considered to be "navigable waters." Yet the court of appeals completely ignored *SWANCC*, concluding that "[t]here is no 'direct abutment' requirement in order to invoke CWA jurisdiction." *See* Pet. App. A21. This conclusion was necessary because no conceivable definition of "adjacent" could bring petitioners' property within the Corps' jurisdiction.[3]

B. "Hydrological Connection" Is Not A Permissible Construction Of "Navigable"

After quoting just one sentence from the legislative history of the Act—that "water moves in hydrological cycles and it is essential that discharge of pollutants be controlled at the source"—the court below breezily concluded that "Congress clearly envisioned that CWA jurisdiction would extend to bodies of water exhibiting a hydrological connection to traditional navigable waters." *See* Pet. App. A17.

The problem with this logic is that *every* molecule of water or water vapor in or above the United States has a "hydrological connection" to navigable waters. The "hydrologic cycle" cited so favorably by the court of appeals is defined as

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[3] Indeed, the Corps itself is not quite sure what properties it may regulate under the Act. Different Corps District Offices use different rules for how close a wetland must be from navigable water before it can be regulated. For instance, under the rules of the Jacksonville District or the Philadelphia District, this case would not be before the Court: those districts do not regulate wetlands more than 200 feet and 500 feet, respectively, from waters of the United States. GAO Report No. 04-297, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices In Determining Jurisdiction*, at 19 (Feb. 2004). Such amorphous and shifting regulatory "standards" make it impossible for landowners, developers, regulators, and other concerned citizens to accurately predict the outcome of the permitting process. *Amici* Peterson and Packee have experienced these problems firsthand in their consulting business.

"a complex sequence through which water naturally passes from water vapor in the atmosphere through precipitation upon land or water surfaces and ultimately back into the atmosphere as the result of evaporation and transpiration." Webster's Third New Int'l Dictionary 1109 (unabridged ed. 1976). One cannot seriously contend from the passing reference to "hydrological cycles" in the legislative history that Congress intended to regulate all of land and sky, yet by the court of appeals' reasoning, the Corps has been given regulatory authority over every swimming pool and birdbath that partially evaporates on a summer's day. Needless to say, "such a ruling would assume that 'the use of the word navigable in the statute . . . does not have any independent significance.'" *SWANCC*, 531 U.S. at 172 (citation omitted).

Again, the Act prohibits unauthorized discharges "into the navigable waters." 33 U.S.C. § 1344(a). In this Court's long history of jurisprudence concerning the Nation's waterways, the term of art "navigable" has had but one meaning: whether the waters in question can be traversed, or be reasonably made traversable, by boat. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871); *Economy Light & Power Co. v. United States*, 256 U.S. 113, 122-23 (1921); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-09 (1940). "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken . . . ." *Morissette v. United States*, 342 U.S. 246, 263 (1952). Maritime terms of art, as incorporated into statutes by Congress, are intended to be given their "established meaning." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991) (construing "seaman").

Just four years ago, this Court recognized that the holding of *Riverside* may have stretched the definition of "navigable" slightly, but explained it did not wish to "read[] the term 'navigable waters' out of the statute." *SWANCC*, 531 U.S. at

172. Although the Court had "said in *Riverside Bayview Homes* that the word 'navigable' in the statute was of 'limited effect,'" the *SWANCC* Court explained that "*it is one thing to give a word limited effect and quite another to give it no effect whatever.*" *Ibid.* (emphasis added). Therefore, the Court concluded "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Ibid.*

What this Court did *not* find in *SWANCC*, unlike the court of appeals, was *any* indication that Congress intended to use a "hydrological connection" test to determine either navigability or jurisdiction. On the contrary, the Court found that nothing in the legislative history of the Act "signifies that Congress intended to exert anything more than its commerce power over navigation." *Id.* at 168 n.3. Congress could have amended the statute at any time since this Court's decision in either *Riverside* or *SWANCC* to clarify or eliminate its use of "navigable." It did not. Indeed, after the *SWANCC* decision numerous commentators fretted that wetlands protection in the United States was coming to an end, and that Congress should amend the Act in order to expand its jurisdiction. *See, e.g.*, Edward A. Fitzgerald, *SWANCC: Isolated Waters, Migratory Birds, Statutory and Constitutional Interpretation*, 43 Nat. Resources J. 11, 68-71 (2003). It is significant that Congress has had multiple opportunities to excise "navigable" from the statute in the four years since *SWANCC*, but has chosen not to do so. *See Gilbert v. United States*, 370 U.S. 650, 658-59 (1962).[4]

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[4] A bill presently pending before Congress would remove the word "navigable" from the Act. Clean Water Authority Restoration Act of 2005, S. 912, H.R. 1356, 109th Cong. (2005). The court of appeals erred in usurping this quintessentially legislative function.

[Footnote continued on next page]

By allowing something with a purported "hydrological connection" to a navigable water to be deemed "navigable" itself, the court of appeals has completely disregarded this Court's ruling in *SWANCC* and removed all meaning from the term "navigable." A water's navigability does not depend upon its ultimate destination; the only consideration is whether someone can drive a boat on it. The water in a puddle on a sidewalk will eventually find its way to a river, but the puddle is surely not "navigable"—and Congress certainly did not intend for the Corps to regulate the child who fills the puddle with dirt to make mud pies.

Despite this Court's ruling in *SWANCC* just four years ago, numerous lower courts refuse to recognize the plain meaning of "navigable," creating a great deal of confusion about the constitutional reach of the Act. Therefore, the Court should again instruct the lower courts to "read the statute as written." *SWANCC*, 531 U.S. at 174. Such an instruction would provide clear and precise guidance to landowners and developers, and would prevent a word purposely inserted into an Act of Congress from having "no effect whatever." *Id.* at 172. Giving meaning to the requirement of "navigability" would also eliminate the need for this Court to consider the constitutionality of the Act. *See, e.g., NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) ("an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available"). Accepting the Corps' construction, by contrast, would require the Court to decide whether Congress can constitutionally subject every drop of water in the Nation to federal jurisdiction. As *amici* demonstrate next, the answer to that question is "no."

[Footnote continued from previous page]

Of course, if the Act were amended in this fashion, the constitutional issue discussed in Part II., *infra*, would arise.

II. IF THE "NAVIGABILITY" REQUIREMENT IS MEANINGLESS, THEN THE CLEAN WATER ACT IS UNCONSTITUTIONAL

In the unlikely event that petitioners' wetlands are considered "navigable waters" under the Clean Water Act, the Act, as applied to such property, is beyond Congress's power to regulate under the Commerce Clause. It is undisputed that the congressional power to regulate interstate commerce necessarily includes "judicially enforceable outer limits." *United States v. Lopez*, 514 U.S. 549, 566 (1995); *see also United States v. Morrison*, 529 U.S. 598, 608 (2000) ("even under [this Court's] modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds"). Enforcement of those limits is necessary to ensure that our federal government acts only within the sphere of enumerated powers conferred on it by the Constitution. *Amici* submit that use of a "hydrological connection rule" as a basis for asserting jurisdiction over wetlands far removed from navigable-in-fact waters clearly exceeds the federal authority to regulate interstate commerce conferred by the Constitution. As a result, the Corps' assertion of regulatory jurisdiction over petitioners' property should be invalidated as unconstitutional.

A. The Regulated Activity Is Discharging Fill

The exact nature of the regulated activity must be determined before proceeding with the Commerce Clause analysis because "'looking primarily *beyond* the regulated activity . . . would "effectually obliterate" the limiting purpose of the Commerce Clause,' and under such an approach, 'the facial challenges in *Lopez* and *Morrison* would have failed.'" *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting) (emphasis added). Discerning the regulated activity in this case is a simple task, as it is specified by the statute: "the discharge of dredged or fill material into the navigable waters." 33 U.S.C. § 1344(a).

But the courts have lost sight of the scope of the regulated activity. If the lower court is to be believed, the regulated activity at issue is not the discharge of fill into navigable waters, but rather the discharge of fill into wetlands . . . that have a surface water connection to nearby drains . . . that trickle into nonnavigable creeks . . . that connect to streams and rivers . . . that later become navigable. Indeed, the Corps presented no proof, nor did either of the lower courts find, that fill material from Rapanos's lands ever reached navigable waters. Nor was any mention made that these "surface waters" in the dubious chain-of-connection actually carry fill material to the drains, or are anything more than pure rainwater. The most the court of appeals could do was speculate that "[a]ny contamination of the Rapanos wetlands *could* affect the Drain, which, in turn *could* affect navigable-in-fact waters." *United States v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003) (emphasis added).[5] In essence, the "hydrological connection" rule supports the contention that the government should have jurisdiction over water that merely *touches* fill material miles away from navigable water, regardless of whether that fill material is actually "discharge[d] . . . into the navigable waters." 33 U.S.C. § 1344(a).

Such a contention goes far beyond the regulated activity. Under the Act, the government can regulate only discharges "into the navigable waters," and thus, only those discharges where fill will *reach* navigable waters. *See Rapanos*, 339 F.3d at 451 ("As [*SWANCC*] makes clear, however, the need

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[5] Although this statement is taken from petitioners' criminal case and not the one before this Court, the court of appeals incorporated the holding of the criminal case into the civil case: "Rapanos' argument regarding *SWANCC* has previously been adjudicated by this court, in a published disposition, and its conclusion is entitled to stare decisis. *See Rapanos*, 339 F.3d at 453." *See* Pet. App. A21.

to protect the navigable waters from pollution, as the Clean Water Act intends, does not require extending the federal government's jurisdiction over all non-navigable waters."). This is completely consistent with both *Riverside* and *SWANCC*. In *Riverside*, fill material discharged into a wetland directly adjacent to navigable waters would reach those waters, and therefore such activity fell under the Act. In *SWANCC*, fill material discharged into an isolated pond would *not* find its way to navigable waters, and thus jurisdiction in that case was unfounded.[6] There is no evidence to support the remote possibility that fill materials from petitioners' lands will reach navigable waters, and therefore petitioners' activities *do not even fall* within the regulated activity.

B. The Discharge Sought To Be Regulated Here Does Not Substantially Affect Interstate Commerce

In *Lopez* and *Morrison*, this Court refined the framework for evaluating the propriety of federal action under the Commerce Clause. Accordingly, the Act's application to non-adjacent, "hydrologically connected" wetlands can be sustained only if the regulation targets the channels of interstate commerce, the instrumentalities of interstate commerce, or if the targeted activity substantially affects interstate commerce. *Lopez*, 514 U.S. at 558-59; *see also Morrison*, 529 U.S. at 609. Assuming, *arguendo*, that the regulated activity at issue is the discharge of fill materials into wetlands that have surface water connections to nonnavigable waters that connect to remote navigable waters, application of the *Lo-*

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[6] To be sure, fill material from an isolated pond *could* find its way to navigable waters if a migratory bird saw fit to make a nest adjacent to the navigable waters from fill material it had carried from the pond, but this Court did not base its *SWANCC* decision on such remote possibilities, and should not do so here.

Lopez/Morrison framework establishes that the activity is far beyond the outer reaches of the Commerce Clause.

1. The first *Lopez* test is whether Congress is regulating the "use of the channels of interstate commerce." 514 U.S. at 558. This test boils down to whether the statute regulates "the passage in interstate commerce of either people or goods." *United States v. Rybar*, 103 F.3d 273, 288-89 (3d Cir. 1996) (Alito, J., dissenting).

Some *navigable* waters of the United States are, literally, channels of commerce among the States, and are therefore subject to federal regulation. *See, e.g., Gibbons*, 22 U.S. at 1. The hydrological connection rule adopted by the Corps and the court of appeals, however, cannot be sustained on this rationale. No serious reading of this Court's Commerce Clause jurisprudence concerning the Nation's waterways could find that the sporadic occasions of surface water, intermittent drains, or creeks near petitioners' wetlands are "navigable waters" used as channels of interstate commerce. *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979) (navigable waters were a marina and pond frequented by boats); *South Carolina v. Georgia*, 93 U.S. 4 (1876) (the Savannah River); *The Montello*, 87 U.S. (20 Wall.) 430 (1874) (Wisconsin's Fox River, used by steamboats); *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871) (Michigan's Grand River, capable of holding a steamboat with a 123-ton load). The drains and creeks at issue certainly do not comprise part of the "highway for commerce between ports and places in different States" that justifies the exercise of federal power. *Ex parte Boyer*, 109 U.S. 629, 632 (1884).

If the government wished to bar the shipment of fill materials across state lines, it could easily do so under its power to regulate the channels of interstate commerce. Likewise it could decree the required depth or width of navigable rivers used in interstate commerce under that same power. But the regulation of wholly intrastate nonnavigable drains and creeks, and the minute amounts of water that drain into them,

clearly does not fall under the first category of Congress's Commerce Clause authority.

2. The second *Lopez* test is whether Congress is regulating "the instrumentalities of interstate commerce." 514 U.S. at 558. These instrumentalities are "the means of conveying people and goods across state lines, such as airplanes and trains." *Rybar*, 103 F.3d at 290. *Amici* do not dispute that the federal government has the power to regulate boats and ships used in interstate commerce. The provision at issue of the Act, however, does nothing of the sort, and the government has not argued that it does. *See* Opp. to Pet. for Cert. at 24.

3. Thus, the hydrological connection rule can be upheld only upon a finding that it constitutes a regulation of activities that "substantially affect interstate commerce." 514 U.S. at 558-59. But the Corps' attempt to extend its jurisdiction to petitioners' property cannot be upheld on this ground either. *Lopez* and *Morrison* instruct that four inquiries are relevant to determining whether a regulated activity has a substantial effect on interstate commerce: (a) whether the regulation by its terms reaches commercial or economic activity; (b) whether the regulation includes an express jurisdictional element; (c) whether Congress has made findings regarding the regulated activity's effect on interstate commerce; and (d) whether the link between the regulated activity and interstate commerce is direct or attenuated. *Lopez*, 514 U.S. at 559-65; *Morrison*, 529 U.S. at 610-12.

a. The hydrological connection rule is not aimed at any commercial or economic activity. This Court explained in *Morrison* that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." 529 U.S. at 613. The Clean Water Act clearly is *not* economic in nature. "'Economics' refers to the production, distribution, and consumption of commodities." *Gonzales v. Raich*, 125 S. Ct. 2195, 2211 (2005) (citation omitted). Whereas there was (at

least arguably) an "established, and lucrative, interstate market" for the marijuana at issue in *Raich*, or for that matter, for the wheat in the seminal case *Wickard v. Filburn*, 317 U.S. 111 (1942), there is *no* commodity or market at issue here.

"Commercial" activities are those "produced for sale." *Raich*, 125 S. Ct. at 2206. There are no sales at issue in this case, only the possible paths of sand and dirt, and therefore no commercial activity.[7] As this Court said in *Raich*, Congress can only regulate non-commercial activities, "if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Ibid. There is no market here.* Neither the Corps nor the court of appeals have put forth *any* argument that a grain of sand that travels from petitioners' land to a river twenty miles distant has a measurable effect on the economic markets of one or more States.[8]

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[7] Although the government might argue that fill materials can be bought and sold on the market, the Act does not require such materials to have been in interstate commerce, or any commerce, for that matter. Nor is the Act geared toward regulating the market for fill materials. The Act may apply to any person who shovels dirt from one end of his property and dumps it at the other end—assuming, of course, that the other end is, or is adjacent to, navigable water.

[8] The Corps did not put forth an argument that petitioners' wetlands or any other "hydrologically connected" wetlands economically affect commerce. Whereas in the past the Corps has argued that interstate commerce is significantly affected by wild animals such as migratory birds, *SWANCC*, 531 U.S. at 159, arroyo toads, *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), red wolves, *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), or small, subterranean invertebrates, *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003), no potentially commercial fish or wildlife is at issue here—only water.

Congress has not determined that all forms of water pollution have economic effects, and therefore did not base the jurisdiction of 33 U.S.C. § 1344(a) on the economic effects of pollution—it based the jurisdiction on navigability. "[W]hat Congress had in mind as its authority for enacting the CWA [was] its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC*, 531 U.S. at 172. And the only reason Congress has jurisdiction over the "navigable waters" listed in the Act at all is because "[i]t was held early in our history that the power to regulate commerce necessarily included power over navigation," and "[t]o make its control effective the Congress may keep the 'navigable waters of the United States' open and free." *Appalachian Elec. Power Co.*, 311 U.S. at 404-05. The assertion that an intrastate nonnavigable waterway may become tainted with minute quantities of sand fails as an economic argument.

b. The Act must contain a "jurisdictional element" to ensure that the requisite nexus with interstate commerce is present. *See Lopez*, 514 U.S. at 561-62. The Corps would point to its own promulgated rule, that grants itself jurisdiction over "[a]ll other waters such as . . . wetlands . . . the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(3). But the applicable question is not what authority the Corps wishes to grant to itself, but rather whether Congress granted its power to the Corps. Not only does the Act grant the Corps power only over "navigable waters," 33 U.S.C. § 1344(a), but none of the stated goals of the Act even mention interstate commerce. *See* 33 U.S.C. § 1251. The Act, then, contains no jurisdictional element, and the Corps has no basis to expand its reach to any property with "water molecules currently present . . . [that] will inevitably flow towards and mix with water from connecting bodies." *United States v. Rueth Dev. Co.*, 189 F. Supp. 2d 874, 877 (N.D. Ind. 2001), *vacated in part*, 189 F. Supp 2d 874 (2002), *aff'd*, 335 F.3d 598 (7th Cir. 2003).

c. The third factor that a court must weigh as part of its substantial effects analysis is whether Congress made legislative findings regarding the manner in which the regulated activity impacts interstate commerce. Simply stated, Congress has *never* sought to explain how an extension of the Corps' authority to wetlands far from navigable waters substantially affects interstate commerce. Indeed, this Court stated that there was "no persuasive evidence" that Congress ever acquiesced to "the Corps' claim of jurisdiction over nonnavigable, isolated, [and] intrastate waters," *SWANCC*, 531 U.S. at 171, and went on to say that nothing in the legislative history of the Act "signifies that Congress intended to exert anything more than its commerce power over navigation." *Id.* at 168 n.3. Congress has made no findings that the filling of remote wetlands far removed from navigable waters has any economic effect on interstate commerce.

d. If the filling of wetlands twenty miles from navigable waters could have a substantial effect on interstate commerce, that would give new meaning to the term "attenuated." This is precisely the type of reasoning condemned by the Court in *Lopez*: "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause tc a general police power of the sort retained by the States." 514 U.S. at 567.

"[I]f *Lopez* means anything, it is that Congress's power under the Commerce Clause must have some limits." *United States v. Rybar*, 103 F.3d 273, 291 (3d Cir. 1996) (Alito, J., dissenting). The federal government does not have the constitutional power to regulate every drip and drop of water in the Nation that might eventually find its way to a navigable waterway. Yet that is precisely what the court below allowed the Corps to regulate: any water that trickles from petitioners' land via a hole in the ground that tortuously, but eventu-

ally, reaches a navigable river. The distance to the river—twenty miles—is irrelevant; all that matters is that the water eventually reaches the river.[9]

The glaring problem with this logic is that it has "no logical stopping point." *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1065 (D.C. Cir. 1997) (Sentelle, J., dissenting), *cert. denied*, 524 U.S. 937 (1998). Even if the property were 100 miles away, it could still be "connected" to the river via intermittent drains, brooks, creeks, and streams, and therefore would still be subject to the claws of the federal government. Taking the logic even further, the water that drains out of every sink, toilet, shower, and bathtub in the Nation eventually reaches a body of navigable water, and therefore Congress can regulate private citizens' kitchens and bathrooms. If this argument seems like hyperbole, consider that a court has conjectured that the federal government has jurisdiction over private land if even *a single raindrop or molecule of water* from the land "ultimately" mixes with a navigable river. *See United States v. Rueth Dev. Co.*, 189 F. Supp. 2d 874, 877-78 (N.D. Ind. 2001), *vacated in part by*

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9 This leads to the logical, but absurd, conclusion that to evade jurisdiction, Rapanos should prevent any water from his land from reaching the Kawkawlin River—by filling the drains. The Galveston District of the Corps of Engineers actually recognizes this practice: "Officials at the Galveston District said a result of this policy is that a nonjurisdictional ditch [a manmade ditch with no high water mark that is not itself a wetland] can be filled without a section 404 permit, severing the jurisdictional connection of the wetland to the water of the United States. After the connection is severed, the previously jurisdictional wetland is rendered nonjurisdictional and can be filled without a section 404 permit." *See* GAO Report No. 04-297, *Waters and Wetlands*, at 23-24. This recognized Corps practice begs another question—if a drain is so remote from navigable waters as to be nonjurisdictional, how does jurisdiction magically manifest if a parcel of wetlands is placed next to the drain?

189 F. Supp 2d 874 (2002), *aff'd*, 335 F.3d 598 (7th Cir. 2003); *see also* Lawrence R. Liebesman & Stuart Turner, *Summary of Federal Court Decisions Interpreting the Supreme Court's 2001 Decision in SWANCC*, SH088 ALI-ABA (May 2003) (crediting both *Rueth* and *United States v. Deaton*, No. MJG-95-2140 (D. Md. Jan. 28, 2002), *aff'd*, 332 F.3d 698 (6th Cir. 2003), for espousing the "migratory molecule" theory of jurisdiction). Such reasoning shows that under a "hydrological connection" rule, even the most attenuated link between "pollutant" and "navigable water" could be a basis for federal jurisdiction.

C. Congress Has No General Police Power To Regulate All Water

Affirmance of the decision below would constitute nothing less than the assertion of a federal police power over all water in the United States, something the Constitution explicitly prohibits: "The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation. *See* Art. I, § 8." *Lopez*, 514 U.S. at 566. "With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate." *Morrison*, 529 U.S. at 618 n.8. This is especially true in the context of land and water regulation, as the Congress and this Court both have recognized that the "traditional and primary power over land and water use" resides with the States: "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . .'" *SWANCC*, 531 U.S. at 174 (quoting 33 U.S.C. § 1251(b)). Because this Court "*always* ha[s] rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power," the attempted creation of a police power over the Nation's waters must be stopped immedi-

ately. *Morrison*, 529 U.S. at 618-19 (quoting *Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring)).

Indeed, the federal government would need a general police power to regulate petitioners' land, because the land certainly has nothing to do with the government's power to regulate interstate commerce. The drains and creeks near the property do not support watercraft used to transport goods or provide services, and therefore definitely are not channels of interstate commerce or part of the "highway for commerce between ports and places in different States." *Boyer*, 109 U.S. at 632. Neither do the drains and creeks substantially affect interstate commerce, even though the Corps argues that commerce is affected because the property's pollutants—or, more accurately, sand—may mix eventually with a body of navigable water.

The decision below flies in the face of this Court's decision in *SWANCC*. The issue in *SWANCC* was whether Congress had regulatory power over an abandoned gravel pit filled with water. As the pond was an isolated body of water, did not carry boats shuttling people or cargo to and fro across state lines, and therefore had absolutely no direct connection to interstate commerce, the Corps went over the top in its attempt to regulate the pond—literally. As it could not allege a commercial connection to the pond via waterway, the Corps took to the sky and claimed that because there were commercial activities associated with migratory birds and those birds landed on the pond in question, the pond, therefore, affected interstate commerce. This Court flatly rejected that argument, finding that there was "no persuasive evidence" that Congress ever acquiesced to "the Corps' claim of jurisdiction over nonnavigable, isolated, intrastate waters." *SWANCC*, 531 U.S. at 171. Therefore, the Court "decline[d] respondents' invitation to . . . hold[] that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(a)'s definition of 'navigable waters' because they serve as habitat for migratory birds." *Id.* at 171-72. This

Court made clear that isolated ponds are not subject to the Act, and off-limits from Congress's attempts at jurisdiction.

Yet though the Corps' aerobatics failed in *SWANCC*, it now wants to bore below the surface in a transparent attempt to regulate remote nonnavigable properties by other means. During heavy rains, water from the abandoned gravel pit in *SWANCC* could overflow and find its way to a drain, possibly mixing with an underground creek, later trickling into a stream, and eventually flowing into a river used to carry cargo between states. The Corps now tries to reassert jurisdiction over petitioners' land via such a dubious connection to interstate commerce. But to do so would render this Court's decision in *SWANCC* meaningless—the gravel pit had absolutely no role in interstate commerce, regardless of whether the purported connection was bird migrations or surface runoff. If the Corps could not reach the *SWANCC* pond from above, this Court should prevent the Corps from grasping petitioners' property from below.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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December 2, 2005